Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Accelerating Wireless Broadband	)	WT Docket No. 17-79
Deployment by Removing Barriers to	)	
Infrastructure Investment	)	

COMMENTS OF THE SEMINOLE TRIBE OF FLORIDA

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I. INTRODUCTION AND SUMMARY

The Seminole Tribe of Florida (Tribe) respectfully submits these comments in response to the Notice of Proposed Rulemaking and Notice of Inquiry (NPRM/NOI) for *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79. The Tribe fully supports the deployment of wireless broadband infrastructure to promote wireless access for all Americans and appreciates the work of the Federal Communications Commission (FCC or Commission) to date in ensuring compliance with the National Historic Preservation Act (NHPA). The Tribe hopes this support continues.

The Tribe understands that the NPRM/NOI was initiated in response to a Petition for Declaratory Ruling filed by PTA-FLA, Inc. The NPRM/NOI stated the FCC incorporated the PTA-FLA Petition into its proceeding and seeks comments on its proposals. The Tribe has very serious concerns regarding the PTA-FLA Petition. The Tribe expressed many or these concerns to the FCC when it met with FCC representatives on February 9, 2017. The FCC subsequently issued its NPRM/NOI. As it stands, the NPRM/NOI threatens to erode the government-to-government relationship between the Tribe and the United States and increase risks to the Tribe's historic properties, including sacred sites, in violation of Federal law.

The Seminole Tribe of Florida is a sovereign Indian tribe that has been federally recognized by the United States government. The Tribe presently has six reservations in Florida, where it remains after having resisted a brutal removal campaign waged by the Federal government. The Tribe's cultural and religious activities depend upon its ancestral lands, and its historic properties, including sacred sites, are located both on and off its reservations. The

United States has a trust responsibility to protect the Tribe's historic properties, and this responsibility stretches across all parts of the Federal government, including the FCC.

The NHPA is an important tool through which the Federal government fulfills its trust responsibility to tribes. Ensuring compliance with the NHPA and other applicable Federal law during the process of deployment of telecommunications infrastructure has been critical to protecting the Tribe's historic properties. The Tribe's experience with this process dates back to 2011, when it received its first notification of the intent to construct a cell tower through the FCC's Tower Construction Notification System (TCNS). The TCNS has efficiently facilitated review of impacts to tribal historic properties, and in numerous instances it has provided the Tribe with an opportunity to provide important feedback to applicants in order to avoid adverse impacts to the Tribe's historic sites. Attached to this comment is a summary prepared by the Tribe's Tribal Historic Preservation Office (THPO) that provides examples of the Tribe's feedback for select TCNS projects. The THPO provides such input to industry applicants in a timely manner and at reasonable fees, which are justified by the level of work required to evaluate each project. To the extent there are issues with certain tribes' fees or excessive delays in project evaluation, the Tribe urges the Commission to deal with those issues on a case-by-case basis.

The Seminole Tribe of Florida and its THPO take their role in the FCC TCNS process very seriously and have always behaved in a fair and professional manner. The Tribe hopes the Commission will likewise take seriously the protection of tribal historic properties, including sacred sites, when considering how to improve the wireless infrastructure deployment process. The Tribe looks forward to further consultation on this matter.

II. DISCUSSION

A. Wireless Infrastructure Deployment is a Federal Undertaking, Triggering Section 106 Obligations

The NPRM/NOI requests comment on whether the FCC should reconsider when wireless facilities construction constitutes a Federal undertaking for the purposes of Section 106 of the NHPA. Construction of wireless infrastructure is undoubtedly a Federal undertaking, and the FCC should not abdicate its duties to abide by the Section 106 process.

The NHPA defines an "undertaking" as including a project, activity, or program "carried out by or on behalf of the Federal agency" or "requiring a Federal permit, license, or approval." 54 U.S.C. § 300320(3). Construction of wireless infrastructure is subject to Federal approval and licensing and transmits Federal spectrum. The FCC, therefore, must retain approval authority over wireless facility construction. Significantly, when the FCC amended its rules in 1990 to require compliance with the NHPA prior to tower construction, the Advisory Council on Historic Preservation (ACHP) commented that the amendment would "help resolve a major problem in the Commission's compliance with Section 106 ... by reducing the potential for licensees and applicants to undertake actions damaging to historic properties without the Commission's review." *In the Matter of Amendment of Envtl. Rules*, 5 F.C.C. Rcd. 2942, 2942 (1990).

The changes in the nature of wireless technology do not lessen the need for Section 106 compliance. Small cell and Distributed Antenna System (DAS) equipment may have a smaller footprint than tower construction, but their construction nonetheless has the potential to have serious adverse impacts to tribal historic properties, including sacred sites. Construction of 5G infrastructure is still a Federal undertaking and must comply with Federal law.

Because deployment of wireless infrastructure is a Federal undertaking, the FCC has two distinct obligations regarding tribes. First, it must "take into account the effect of the

undertaking on any historic property." 54 U.S.C. § 306108. Historic properties include property eligible for the National Historic Register that is of "traditional religious and cultural importance to an Indian Tribe...." *Id.* §§ 300308, 302706(a). Although the PTA-FLA Petition repeatedly refers to "burial grounds," sites of religious and cultural importance include, without limitation, archaeological sites, natural features, landscapes, traditional cultural properties, migration routes, and sacred sites.

In carrying out its obligation to assess impacts to tribal historic properties, the FCC would generally need to secure the historical, cultural, and religious expertise of any tribe whose historic properties could be affected because the FCC lacks this expertise. The TCNS system has aided in streamlining this process by creating a system in which industry applicants work with tribes in order to assess whether a project will have adverse impact on tribal historic properties. This tribal–industry cooperation has been beneficial to all parties involved and has expedited, rather than hindered, the communications infrastructure build-out that has occurred over the past decade. However, if tribes choose not to provide their expertise to industry applicants through this process, the FCC may not allow applicants to self-certify Section 106 compliance without further Commission review. Responsibility for Section 106 compliance is a Federal responsibility, and relinquishment of this duty would violate NHPA and the Federal trust responsibility.

Separately, the NHPA provides that the FCC "shall consult with any Indian Tribe ... that attaches religious and cultural significance" to tribal historic properties that might be affected by a Federal undertaking. The consultation obligation is independent from the duty to evaluate impacts on tribal historic properties, and it may not be delegated to industry applicants. Further, tribal participation in consultation is part of the government-to-government relationship between

the United States and Indian tribal governments and is distinct from the expert advice tribes provide industry applicants as consultants or contractors.

Because construction of wireless infrastructure, including small cell and DAS facilities, is a Federal undertaking, the FCC must comply with its obligations under Section 106. Failure to do so will merely leave the scope of FCC responsibilities up to the courts, resulting in increased costs to all parties and lengthy delays of 5G deployment.

B. No Additional Categorical Exclusions Are Warranted

The FCC should not adopt additional categorical exclusions from the Section 106 process. Categorical exclusions should not be based on the size of the infrastructure being constructed. Small cell and DAS facilities cannot be assumed to have minimal potential to adversely affect historic properties. Even the construction of small infrastructure can desecrate important sacred sites or mar other sites of cultural and religious importance, which is why it is critical that tribes be involved in the process of evaluating potential impacts.

Harm to tribal historic properties can also occur even where small cell and DAS facilities are collocated on existing infrastructure. In general, collocation likely poses less of a threat to tribal sacred and cultural sites where existing infrastructure has undergone the Section 106 review process, but this cannot be assumed. The PTA-FLA Petition is incorrect that collocations "would never have an adverse tribal impact." For instance, there may be situations in which the addition of new infrastructure creates a new problem, such as additional ground disturbance in the construction process or visual obstruction.

Nor should exclusions be created on the theory that sites have been previously disturbed, which essentially assumes that no further harm can come to tribal historic properties where harm has already occurred. Construction of additional infrastructure will, in some instances,

compound the harm to tribes. The PTA-FLA Petition argues that sites that "will obviously have no effect on tribal burial grounds" such as "parking lots, farm lands, previously developed sites, [etc.]," should be exempt from review. This demonstrates a fundamental misunderstanding of the scope of sites of religious and cultural importance, limiting them to "burial grounds," as well as a misunderstanding of basic archaeological principles. For instance, even in the case of burial grounds, these may be located under parking lots, farm lands, previously developed sites, and the like.

Thus, there should not be an exclusion for collocations on "Twilight Towers," which were built prior to March 7, 2005, without adequate review of their impact on tribal historic properties. So far as the Tribe is aware, the FCC has not undertaken any effort to determine whether these Twilight Towers are having adverse impacts on tribes and whether these impacts would be exacerbated by collocation of additional infrastructure. Similarly, exclusions should not be expanded for existing utility rights of way to include historic districts, and additional exclusions should not be created for transportation rights of way. Often these rights of way were created without tribal consultation, and this is particularly true in the case of older transportation rights of way. Assessment of the impact of constructing wireless infrastructure in these rights of way is essential to protecting tribal historic properties.

C. Tribal Fees Are Appropriate for Consulting Work

The FCC should not accept the PTA-FLA's proposal to prohibit tribal fees. The FCC acknowledged the appropriateness of tribal fees in its regional model voluntary best practices. *Voluntary Best Practices for Expediting the Process of Communications Tower and Antenna Siting Review Pursuant to Section 106 of the National Historic Preservation Act* (October 25,

2004).[1] The FCC stated that "[c]onsistent with the ACHP Memorandum on *Fees in the Section 106 Review Process*, payment to a Tribe is appropriate when an Agency or Applicant 'essentially asks the Tribe to fulfill the role of a consultant or contractor' when it 'seeks to identify historic properties that may be significant to an Indian Tribe, [and] ask[s] for specific information and documentation regarding the location, nature and condition of individual sites, or actually request[s] that a survey be conducted by the Tribe.'"[2]

The Tribe's standard project assessment fee is justified by the level of effort required by its THPO to evaluate each project. The THPO's project assessment requires the assistance of three to four of the Tribe's staff and the use of proprietary information developed by the THPO in consultation with the tribal community over a long period of time. The fee is also commensurate with fees charged by many of the other tribes whose area of interest (AOI) encompasses the southeastern United States. The tribal project assessment fees have had a positive impact on the THPO's ability to effectively manage the review requests for telecommunications facilities. The Tribe does not intend that such fees fund the entire operation of the THPO, but it does expect that the fees will cover the costs of conducting project assessments.

The PTA-FLA's Petition states that "in no cases do the FCC's rules provide that prospective opponents of a particular action must be paid to determine whether they lodge a protest – except one: tribal notifications." The Tribe, however, does not consider itself a prospective opponent. Rather, it seeks to voluntarily work with industry applicants to provide them with the Tribe's expertise regarding whether proposed projects will have an adverse impact

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[1] Available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-253516A2.pdf.
[2] Quoting Executive Director Memorandum of John Fowler, Advisory Council on Historic Preservation, regarding *Fees in the Section 106 Review Process* at 3 (July 6, 2001).

on its historic properties. Further, reasonable compensation is standard for any expert, consultant, or government agency providing services to a private entity.

Fees should not be limited to $50 as proposed by the PTA-FLA in situations that are not "exceptionally complex." This proposal assumes that tribal reviews are quick and not inherently exceptionally complex. Creating a standard fee that is more appropriate may be reasonable if it is derived from the typical fees a private consulting firm would charge for a similar amount of time, labor, and overhead expenses associated with employing additional review staff.

The PTA-FLA also alleges that fees have likely encouraged the expansion of the AOIs claimed by tribes. The PTA-FLA Petition, however, provides no evidence of this linkage. The Tribe believes that a much more likely explanation is that the ability of tribes to charge an assessment fee for the services they provide in a contractor or consultant capacity allows them to engage in more widespread review of projects proposed to be located in their ancestral lands. The scope of AOIs is discussed further below.

Given the expenditure of staff time and resources to perform project assessments, prohibiting fees or imposing an unreasonably low cap is not an appropriate solution to a few tribes purportedly charging excessive amounts. The FCC can and should deal with such instances on a case-by-case basis.

D. Each Tribe Should Be Allowed to Assess Impacts In Its Area of Interest

The NPRM/NOI seeks comments on mitigating the burden to applicants of having to consult with different tribes that have overlapping AOIs. The FCC has an obligation to assess impacts to tribal historic properties even when multiple tribes are potentially affected. Tribes are not homogeneous, and the United States' government-to-government relationship exists with each sovereign Indian tribe.

The NPRM/NOI states that tribes have increased their areas of interest within the TCNS "as they have improved their understanding of their history and cultural heritage." Often, however, expansion of AOIs is likely explained by increased tribal capacity to engage in project reviews. Many tribes, including the Seminole Tribe of Florida, have retained a deep understanding of their own history and cultural heritage, passed down over generations. This includes an understanding of their traditional homelands as well as the history of dispossession and forced removal, which informs what they consider to be the bounds of the Tribe's AOI. The Tribe defines its AOI as the Tribe's ancestral, historic, and ceded lands. These lands lie primarily within the southeastern United States and along the Gulf Coast. This encompasses Florida, Georgia, Alabama, Mississippi, and portions of South Carolina, Tennessee, and Louisiana. Presently, the Tribe limits its assessment of TCNS projects to Florida, but it retains its right to expand its assessment area to include any or all of the Tribe's AOI based on tribal priorities, concerns, or acquisition of new information.

The PTA-FLA Petition demonstrates a profound lack of understanding or sensitivity in stating that "some tribes have declared relatively vast ranges of the United States to be areas of interest, including entire states that they may or may not have passed through at some point in the last four centuries. If a tribe hunted in Tennessee in the 17th century or walked through Kentucky on its way west, those entire states can be declared areas of interest...." The statement incorrectly and offensively implies that tribal history only goes back four hundred years to the arrival of Europeans. It also diminishes the significance of tribal historic properties when continuity was not maintained over those four hundred years, rather than acknowledging that very important sites may be located in areas in which a tribe did not permanently reside. Further, the PTA-FLA's reference to areas a tribe has "walked through ... on its way west" glosses over

the brutal history of the forced removal of eastern tribes by the United States and demonstrates a considerable lack of awareness about the importance of removal routes and the sites surrounding them. This lack of understanding illustrates the necessity of tribal input in determining the impact on tribal historic properties.

As noted in the NPRM/NOI, the PTA-FLA proposes that tribes be "required to identify under objective, independently verifiable criteria areas where construction could reasonably be deemed to have an impact," and suggests that when tribes need to preserve the secrecy of certain sites, they could be disclosed to the Commission in confidence. Tribes are in the unique position of having specialized knowledge of their own history and ancestry, and they should not have to provide certification of their AOI outside of the unlikely event that there is clear abuse of the system. Additionally, particular sacred sites are not necessarily discrete areas that are readily identifiable and which can be easily entered into a database. They may not be known to exist until review of a particular area is performed, and some sacred sites may not be revealed to persons outside a tribe.

No examples or evidence of abuse of the process of identifying tribal AOIs have been provided. Time and again, tribal oral histories have proven accurate in describing geographic ranges, geologic and natural events, and other phenomena that have been independently verified. Tribes' oral histories and their expertise should be respected, and the FCC should deal with any cases of clear abuse on an individual basis.

E. The TCNS Process Is Working And Should Be Maintained

The TCNS process has been an effective way to streamline the FCC's Section 106 obligation to assess impacts to tribal historic properties. As exemplified in the attachment from the Tribe's THPO, through this process the Tribe has provided specific information to applicants

that has alerted them when projects threatened the Tribe's historic properties. As the attached summaries from the THPO demonstrate, the PTA-FLA is incorrect that "a massive amount of effort and money is being directed at a problem which does not truly exist." The review process has produced clear benefits. The PTA-FLA argues that sensitive sites are hardly ever impacted, yet this is a result of the success of industry and tribes working together to identify and avoid adverse impacts.

The PTA-FLA Petition and the NPRM/NOI express concern with the delay caused by the tribal review process. The timelines built into the process are designed to provide tribes sufficient time to research proposed projects. Delays that do occur are often the result of the applicant providing incomplete information to tribes. To the extent extraordinary delays occur in particular cases, the FCC should hold both tribes and industry applicants accountable on a case-by-case basis.

The PTA-FLA's proposal to replace pre-construction review with an insurance fund to cover the cost of work stoppage and site restoration when a site is discovered is wholly inappropriate. The FCC has a trust responsibility to protect tribal historic properties and an obligation under the NHPA to review potential adverse impacts before they occur. The preservation of the Tribe's sites of cultural and religious significance cannot be replaced by a process that allows for their destruction and then "restoration," and indeed there often can be no way to truly restore tribal historic properties that have been disturbed or inadvertently destroyed.

The TCNS system has been a model for tribal–industry cooperation. This collaborative process helps avoid the cost and delay of litigation and the conflict that can arise when tribal citizens are excluded from industry project evaluations, such as in the conflict that arose over the Dakota Access Pipeline. Largely due to this process, telecommunications infrastructure

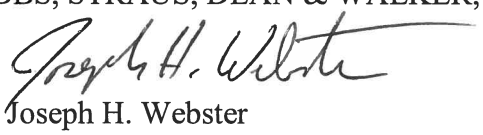
construction over the last decade proceeded in a relatively smooth fashion and in an environment of mutual respect. The Tribe strongly encourages the FCC to continue to support this collaboration as the deployment of 5G wireless infrastructure unfolds.

III. CONCLUSION

The Seminole Tribe of Florida appreciates this opportunity to comment on the NPRM/NOI. The Tribe urges the Commission to weigh heavily the public interest in protecting tribal historic properties, recognizing that these sites are critical to the Tribe's identity, culture, and religious practice. The Tribe hopes that the FCC will work closely with tribes as it moves forward. The Tribe stands ready to engage in constructive dialogue with the Commission and assist the Commission in considering ways that any deficiencies in the current system can be addressed.

Sincerely,

HOBBS, STRAUS, DEAN & WALKER, LLP



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Summary of Select TCNS Projects

TCNS 122229 (Nichols Lake Site, Milton, Santa Rosa County, FL) - is an example of a tower location in which cultural material was found and because the CRAS report was inadequate the STOF-THPO was forced to request additional information.

TCNS 127157 (John Anderson Tower, Flagler Beach, Flagler County FL)- is an example of a tower location in which the THPO-STOF requested "an inadvertent discovery clause in the report provided to the applicant" due to the location of the tower near an area with a high frequency of archaeological sites. Several of those archaeological sites also were noted as having human remains in the past.

TCNS 134740 (Sumter Croft, Sumterville, Sumter County FL) - is an example of a tower location that tested positive for cultural material and in which Phase II testing was necessary. Four archaeological sites were found. We did not agree with the consultant's recommendation of ineligible for all four sites and recommended avoidance or monitoring.

TCNS 131335 (Lemon Bay High School, Englewood, Charlotte County FL) - is an example of when the STOF-THPO asked for a qualified human skeletal analyst (as defined by FL Statute 872.5) to monitor because the tower was located in the vicinity of a destroyed burial mound 8CH7(Lemon Bay School Mound). The mound was destroyed with a bulldozer and the numerous remains were scattered over a wide area.

TCNS 129815 (Sheffield Pasture 101852, Greenville, Madison County, FL)- is an example of when the contractor found a site (8MD00328) with a possible intact hearth and failed to address the integrity of the cultural deposits at the site in the report. The STOF-THPO objected to the contractor's recommendation of "no historic properties" and requested Phase II testing.

TCNS 140673 (Dice 101598, Taylor County, FL)- is an example of when the contractor found an archaeological site (8TA00598) and it was determined that there was insufficient information to determine the site's eligibility. STOF-THPO requested that a monitor be present and that 20% of the disturbed sediment from construction be screened for cultural material.